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Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

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IN THE SUPREME COURT
OF THE STATE OF UTAH

LARRY EUGENE PLUMB,

Plaintiff/Respondent

vs.

Case No. 14465

PENELOPE JEANNE PLUMB,

Defendant/Appellant.

REPLY BRIEF OF APPELLANT

An appeal from a decision of the Third
District Court in and for Salt Lake
County, State of Utah, the Honorable
Gordon R. Hall, presiding.

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TABLE OF CONTENTS

Page

POINT I	PENNY PLUMB DID NOT RELINQUISH CUSTODY OF SCOTT PLUMB TO THE UTAH STATE DIVISION OF FAMILY SERVICES-----	1
POINT II	THE UTAH STATUTE PROVIDES CONTINUING SUBJECT MATTER JURISDICTION OVER CUSTODY MATTERS BUT NOT PERSONAL JURISDICTION OVER PERSONS DOMICILED IN A FOREIGN STATE-----	4

Cases Cited

Leach v. Leach, 336 P.2d 425 (1959)-----	4,5
Lyerla v. Lyerla, 403 P.2d 99 (1965)-----	4
People v. Nelson, 322 Mich. 262, 33 N.W.2d 786 (1948)-----	3
People v. Spiers, 17 Cal. App.2d 477, 62 P.2d 414 (1943)--	3

Statutes Cited

Utah Code Ann. § 55-10-109 (1953)-----	2
--	---

Authorities Cited

59 Am. Jur. 2d, Parent and Child, § 34 at 117-----	2
--	---

IN THE SUPREME COURT
OF THE STATE OF UTAH

LARRY EUGENE PLUMB,

Plaintiff/Respondent

vs.

Case No. 14465

PENELOPE JEANNE PLUMB,

Defendant/Appellant.

REPLY BRIEF OF APPELLANT

POINT I PENNY PLUMB DID NOT RELINQUISH CUSTODY OF
SCOTT PLUMB TO THE UTAH STATE DIVISION OF
FAMILY SERVICES.

In Point I of his Argument, Respondent quotes from
Judge Hall's Findings of Fact:

"That prior to August, 1974, defendant had voluntarily placed Scott Plumb in the care of the Utah State Division of Family Services. The Division of Family Services had then placed Scott Plumb in the home of plaintiff's parents, Mr. and Mrs. Larry Plumb. On or about August, 1974, defendant took Scott Plumb to South Dakota without permission or consent of the Division of Family Services and without informing Mr. and Mrs. Larry Plumb. (Sup. R.2)."

Respondent then states that from the above facts, "it is apparent" that the lower court found that Utah remained Scott's domicile. Appellant submits that such inference is

not apparent or obvious from the quoted finding. Although the lower court denied Plaintiff's Motion to Dismiss for lack of jurisdiction, no Findings of Fact or Conclusions of Law explained the basis for the court's jurisdiction.

The inaccurate assumption that Utah remained Scott's domicile is supported by Respondent's faulty conclusion that Defendant relinquished her custodial and parental rights and obligations to the Utah State Division of Family Services (Respondent's Brief at 5). The District Court found that "...defendant had voluntarily placed Scott Plumb in the care of the Utah State Division of Family Services (Sup. R.2)." This cannot be construed to mean that she gave up custody since there was no court action authorizing a permanent transfer or making Penny Plumb's informal arrangement with the Division of Family Services legally binding.

"Since the parent is subject to obligations which he cannot throw off by any act of his own, agreements by which the parents, or one of them, transfer custody of a child to a third person, with the provision or informal understanding that custody will not be reclaimed, are not generally considered legally binding contracts,... This is especially true in the case of a parent who, having been compelled by poverty or unfavorable circumstances to surrender the custody of his child, wishes to reclaim it when his circumstances are improved." (59 Am. Jur. 2d, Parent and Child, Section 34 at 117).

Section 55-10-109, U.C.A. (1953), provides that a court decree terminating parental rights may be granted only after

a hearing on the question. Such termination does not take place due to an informal, voluntary agreement as Respondent suggests.

Penny Plumb's agreement with the Division of Family Services did not transfer Scott's custody to Larry Plumb, his parents, or the Department of Family Services. The Decree of Divorce did not prohibit the custodial parent from leaving Utah. Plaintiff was not required to ask permission of any party to leave Utah. Penny Plumb did not leave Utah with the intention of defeating the Utah Court's jurisdiction since there was no litigation threatened or in progress. Penny Plumb's family and all her roots are in South Dakota. It cannot be construed that she returned there with any motives but to reestablish her home. Therefore, Scott Plumb's domicile changed with that of his mother.

The fact that Penny Plumb was Scott's legal custodian when they left Utah defeats any allegation of kidnapping. People v. Spiers, 17 Cal. App.2d 477, 62 P.2d 414 (1943). People v. Nelson, 322 Mich. 262, 33 N.W.2d 786 (1948). The fact that neither Larry Plumb, his parents, nor the Division of Family Services brought any action for the return of Scott Plumb for more than seven (7) months after he and his mother were domiciled in South Dakota further indicates that those parties did not believe that Scott was kidnapped from his proper custodian as Respondent now contends.

The first half of Respondent's argument rests on this allegation that Appellant gave up or relinquished her legal custody of Scott Plumb. At no time did she agree or intend to relinquish custody. She acquiesced to the recommendation of the Utah Division of Family Services that Scott be placed with his paternal grandparents for a period of time. No court decree or order was obtained to transfer Scott's custody from Penny Plumb to the Division of Family Services.

Therefore, the child's domicile did change with that of his mother and defeats Point I of Respondent's Argument as presented in his brief before this Court.

POINT II THE UTAH STATUTE PROVIDES CONTINUING
SUBJECT MATTER JURISDICTION OVER CUSTODY
MATTERS BUT NOT PERSONAL JURISDICTION OVER
PERSONS DOMICILED IN A FOREIGN STATE.

Respondent claims the Kansas case cited by Appellant, Leach v. Leach, 336 P.2d 425 (1959) was supplanted by that Court's 1965 decision of Lyerla v. Lyerla, 403 P.2d 99. The change in the Kansas Supreme Court's opinion was due to a corresponding change in the relevant Kansas statute. The new statute specifies the particular occasions when the court's jurisdiction applies to foreign domiciliaries. The earlier Kansas statute, like the Utah statute, did not specifically state when the Kansas Court could retain jurisdiction over

foreign domiciliaries. Thus, under the facts of this case the Leach decision is controlling.

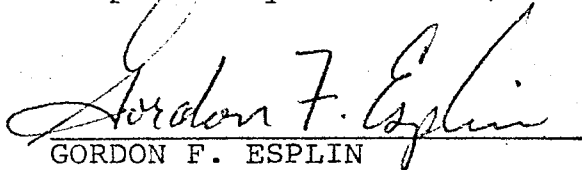
There is much disagreement among the courts in the area of child custody jurisdiction where the parties involved are domiciliaries of different states. The court where the child is domiciled is in the best position to decide the best interests of the child, ie. who shall have custody since the witnesses the court needs reside where the child does. Thus, this Court should hold that at the time of Plaintiff's April 18, 1975 Order to Show Cause in the District Court of Salt Lake County, Utah, the child Scott Plumb and Defendant were domiciliaries of South Dakota and, therefore, the District Court of Salt Lake County did not have jurisdiction over the persons of Scott Plumb or Defendant to hail them into the Utah Court, though the Utah Court by statute (Section 30-3-5) had jurisdiction over the subject matter of the dispute (custody of the child).

Requiring the child and the custodial parent to be residents of this state before our courts relitigate custody may encourage custodial parents to flee from Utah when they feel action is pending. The simple solution is that the child's domicile does not change where there is a last minute move to defeat the Utah Court's jurisdiction. In this case, mother and child had been in South Dakota for a full seven (7) months before Plaintiff obtained his Order to Show. If this Court

affirms the District Court's ruling on jurisdiction, custodial parents may be compelled to return to Utah from the farthest reaches of the nation after decades of domicile outside of Utah by the non-custodial parents merely filing an Order to Show Cause in Utah. Obviously, the better rule is to compel the non-custodial parent to travel to the jurisdiction where the child is domiciled, unless the legislature decides differently as in Kansas. It is doubtful in the instant case whether Plaintiff's concern for the child and the merit of his case would have been sufficient to motivate him to travel to South Dakota to litigate the matter.

DATED this 17th day of June, 1976.

Respectfully Submitted,


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Appellant